

In the Supreme Court of the United States.

THE ASSARIA STATE BANK, OF ASSARIA, THE
CITIZENS BANK, OF AXTELL, *et al.*, *Appellants*,
vs.

JOSEPH N. DOLLEY, as Bank Commissioner of the
State of Kansas, and MARK TULLEY, as Treasurer of
the State of Kansas, *Appellees*.

No. 617.

BRIEF OF APPELLEES.

PROPOSITIONS DISCUSSED.

1. The Kansas bank guaranty law is a voluntary law and applies only to those who seek and obtain admission to its benefits, and therefore cannot "constitute a taking of property without due process of law," or a denial of the "equal protection of the laws."

Merchants Bank v. Pennsylvania, 167 U. S. 461.

Commonwealth v. Merchants Bank, 168 Pa. St. 309.

2. The appellant banks have not presented by their bill such a state of facts as will work a justiciable injury to them.

Supervisors v. Stanley, 105 U. S. 305.

Clark v. Kansas City, 176 U. S. 114.

Smiley v. Kansas, 196 U. S. 447.

Merchants Bank v. Pennsylvania, 167 U. S. 461.

Commonwealth v. Merchants Bank, 168 Pa. St. 309.

Turpin v. Lemon, 187 U. S. 51.

Branton Co. v. W. Va., 208 U. S. 192.

State v. Smiley, 65 Kan. 240.

Marbury v. Madison, 1 Cranch 137.

Tyler v. Registration, 179 U. S. 405.

3. The appellants, being all citizens of the state of Kansas, have not presented a state of facts which raises a controversy under the constitution of the United States.

Metcalf v. Watertown, 128 U. S. 586.

Tennessee v. Planters Bank, 152 U. S. 454.

Blackburn v. Portland Mining Co., 175 U. S. 571.

4. The banking business is a public business, and its regulation is within the police power of the state.

Freund on Police Power, secs. 400, 401.

Tiedeman on Limitations, sec. 194.

Blaker v. Hood, 53 Kan. 499.

State v. Richcreek, 5 L. R. A., n. s., 878, 77 N. E. 1085.

Bank of Augusta v. Earle, 13 Pet. 519.

Zane, Banks and Banking, secs. 8 and 9.

Morse on Banking, sec. 13.

Bank v. San Francisco, 142 Cal. 246.

5. The Kansas bank guaranty law is a regulation of banking and is a proper exercise of the police power of the state.

Freund on Police Power, sec. 400.

Gundling v. Chicago, 177 U. S. 183.

Lawton v. Steele, 152 U. S. 133.

Marbury v. Madison, 1 Cranch 137.

Otis v. Parker, 187 U. S. 606.

Chi. B. & O. v. People, 200 U. S. 561.

Powell v. Penna., 127 U. S. 678.

THIS suit was brought by the complainants, who are forty-seven state banks incorporated under the laws of the state of Kansas.

The legislature of the state of Kansas, at the session of 1909, enacted a law known as the bank depositors' guaranty law, which was an act providing for the security of deposits in the incorporated banks of Kansas,

creating the bank depositors' guaranty fund of the state of Kansas, and providing regulations therefor and penalties for the violation thereof. This law we give in full in appendix to this brief.

The complainants filed their bill in the Circuit Court of the United States for the district of Kansas against the defendants for the purpose of testing the constitutionality and validity of this law, asking the court to enjoin the defendants from putting the law into operation. This bill was filed on the 14th day of September, 1909. The defendants, upon September 29, 1909, filed their demurrer to this bill. (Rec. 36.) The issues so joined upon the complaint and demurrer were argued by counsel and were submitted to the court on arguments and briefs, and thereafter, and on the 23d day of December, 1909, the court, by JOHN POLLOCK, Judge, who heard the case, sustained the demurrer of the defendants to the complainants' bill and handed down a memorandum of decision thereon. (Rec., pp. 41-92.) The case was brought by the banks to this court. So much of the decision of the court as treats of this case we have printed in this brief. In the decision Judge POLLOCK made a statement of the material averments of the complainants' bill. He said:

"In case No. 8816, in which the Assaria State Bank and forty-six other state banks are complainants, and the treasurer and bank commissioner of the state are defendants, it is averred at and before the passage of the act in question complainants were organized, qualified and doing a banking business under and in pursuance of the laws of the state, in the several different portions of the state where located. That in pursuance of the laws under which they were created and doing business prior to the passage and taking effect of the act in question, their shareholders were liable, in addition to the money represented by their shares, to an amount equal to the par value thereof to the creditors of the bank. That a part only of complainants are qualified to accept the terms of the act. That complainants are taxpayers of the state, and a large amount of the funds so collected from complainants by

taxation, forming a part of the general revenue fund of the state, is being employed by defendants in carrying into effect the act in question, but that no complainant has been required to or will pay into such fund to be so used the sum of two thousand dollars. That it is the object, purpose and intent of defendants, as officers of the state, to require all qualified banks to accept the provisions and obligations of the act. That many banks of the state are accepting its provisions. That more than seven hundred in number are qualified to accept under the provisions of the act. That those of complainants who are not qualified, and all complainants that are qualified but refuse to accept the provisions of the act, will be by the operation of the law, and the business advantages possessed by banks under the law, driven out of business and compelled to suspend operations. That as to each of the complainants, the right to continue in business, which will be thus destroyed, is of a value in excess of two thousand dollars. That complainant banks are depositors in other banks of the state in large amounts, that have accepted the provisions of the act, or, being qualified, threaten to accept such provisions, and that the operation of the law discriminates against complainants. That the act in question is violative of the constitution and laws of the United States, and the provisions of the constitution of the state as well, in respects hereinafter stated. Wherefore, a decree is prayed declaring the act in question invalid and void, and restraining defendants from enforcing its provisions."

We do not attempt to improve on this statement made by the court. In the opinion the court considered and decided three cases submitted upon demurrers to three separate bills, and wrote but one opinion. We here segregate that portion of the opinion relating to this case; and, proceeding, the court said:

"In regard to the averments of the bill of complaint in case No. 8816, considered for the purpose of determining its sufficiency to confer jurisdiction on this court to inquire as to the validity of the act in question, it may be observed, in the first instance, it is wholly immaterial to complainants whether the act be constitutional and valid or unconstitutional and invalid in its scope, operation or effect in its relation to others.

Before complainants may be heard to complain they must show by the averments of their bill such a state of facts existing or threatened as will work a justiciable injury to themselves. (Supervisors v. Stanley, 105 U. S. 305; Clark v. Kansas City, 176 U. S. 114; Smiley v. Kansas, 196 U. S. 447.) As in the present case the parties are each and all citizens of this state, it matters not how much injury may come to complainants by the enforcement of the act, even if it be unconstitutional in matters averred in violation of the provisions of the constitution of the state, for such matters are exclusively for the consideration and determination of the courts of the state, unless, in addition thereto, the bill presents a state of facts which, in good faith, raises a controversy as to the validity of the act arising under the constitution and laws of the United States, the decision of which controversy may be determinative of the case. (Metcalf v. Watertown, 128 U. S. 586; Tennessee v. Union and Planters' Bank, 152 U. S. 454; Blackburn v. Portland Gold Mining Co., 175 U. S. 571.)

"Examined in the light of these principles, do the averments of the bill of complaint in case No. 8816 present a controversy arising under the constitution and laws of the United States, in which controversy there is involved an amount sufficient to confer jurisdiction on this court?

"As seen from the statement made, complainants were corporations of the state, duly organized and doing a banking business within the state at and prior to the date of the passage and taking effect of the act in question. That a part only of complainants are qualified to accept the conditions imposed and receive the benefits of the act in question. That prior to the passage of this act their shareholders were liable only to creditors of the bank to the amount paid for the shares, and in addition the face value of the shares. That if complainants shall accept the provisions of the act they will impose an additional burden on their shareholders to contribute for losses sustained by depositors in other institutions. That as to those of complainants qualified to accept the provisions of the act, which do not accept, and those disqualified, the advantage obtained by those institutions which do accept the provisions of the act will destroy the business of complainants, the value of the right to continue which exceeds in amount that necessary to confer jurisdic-

tion on this court. That complainants, in common with other citizens, taxpayers of the state, have been compelled by taxation to contribute to the general revenue fund of the state, which is being employed by defendants to carry the act into operation. That complainants are depositors in and creditors of other state banks which have accepted the conditions and obligations imposed by the act, and that the operation of the act in settling the affairs of such other banks will unjustly discriminate against complainants as creditors of such other banks, and will impair the obligation of complainants' contracts with such banks.

"In so far as complainants are qualified to accept the provisions of the act but decline to do so, I see no just cause on their part to complain of discrimination against them. If they are discriminated against by the terms of the act, the privileges of which they may accept, and they decline to do so, it is their failure to accept, and not the law, which causes the injury, and they will not be heard to complain. As to those complainants disqualified from participating in the benefits of the act, it is not shown the condition which produces this disqualification may not be changed by such banks and the provisions of the act then accepted. If so, such of complainants may not be heard to contend of the law's discrimination against them, for, in such case, it is not the law, but the facts constituting the disqualifying conditions, which produces the discrimination. This clearly appears from a consideration of the case of *Merchants' Bank v. Pennsylvania*, 167 U. S. 461, wherein Mr. Justice BREWER, delivering the opinion, said:

"If it be said that a lack of uniformity renders the statute obnoxious to that part of the fourteenth amendment to the federal constitution which forbids a state to 'deny to any person within its jurisdiction the equal protection of the laws,' it becomes important to see in what consists the lack of uniformity. It is not in the terms or conditions expressed in the statute, but only in the possible results of its operation. Upon all banks shares, where state or national, rests the ordinary state tax of four mills. To every bank, state or national, and all alike, is given the privilege of discharging all tax obligations by collecting from its stockholders and paying eight mills on the dollar upon the par value of the stock. If a bank has a large surplus, and its stock is in consequence worth five or six times its par value, naturally it elects to collect and pay the eight mills, and thus in fact it pays at a less rate on the actual value of its property than the bank without a surplus, and whose stock is only worth par. So it is impossible, under the operation of this law, that one bank may pay at a less rate upon the actual value

of its banking property than another; but the banks which do not make this election, whether state or national, pay no more than the regulation tax. The result of the election under the circumstances is simply that those electing pay less. But this lack of uniformity in the result furnishes no ground of complaint under the federal constitution.

"Again, it will be perceived that this inequality in the burden results from a privilege offered to all, and in order to induce prompt payment of taxes, and payment without litigation. To justify the propriety of such inducement, we need look no further than the present litigation."

"In so far as the bill avers the misapplication of the revenues of the state raised from complainants and others by taxation, while it is true by reason of the provisions of chapter 334, Laws of 1905, an injunction may be granted to restrain the illegal levy of any tax, charge, or assessment, or any proceeding to enforce the same, and that an injunction may be granted to restrain any public officer, board or body from entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge, or assessment, and that any number of persons whose property may be affected by any tax or assessment so levied, or whose burden as taxpayers may be increased by the threatened unauthorized contract or act, may unite in a suit to obtain such relief; and while in a proper case the statutory right of suit here granted might be asserted in this court, yet it is clear, as between citizens of this state, such right cannot be enforced here even if the value of the rights sought to be protected were sufficient to confer jurisdiction on this court, for such controversy does not arise under the constitution and laws of the United States.

"In so far as it is averred in the bill, by the operation of the act in question, the rights of complainants, as depositors and creditors of other state banks which have accepted or threaten to accept the provisions of the act, are discriminated against and their contract rights impaired, it will be noticed it is not averred any such guaranteed bank in which any complainant has a deposit or credit has failed or its affairs are about to be settled under the provisions of the act, hence, of necessity, the protection sought against that feature of the act, under the averments of the bill at this time, rests in mere speculation, and is based on no tangible rights of complainants. If such event shall transpire in future, and this feature of the act of which complaint

is made shall be attempted to be enforced, to the impairment of the contract rights of any complainant, a controversy of merits may then arise, but such controversy is not presented by the bill in question.

"It follows, the demurrer based on want of jurisdiction in case No. 8816 must be sustained. And unless complainants, being so advised by their solicitors, shall amend their bill of complaint by the January, 1910, rules of this court, the bill will stand dismissed for want of jurisdiction."

At the same time the bill was filed in this case, the same solicitors filed a bill in the same court for one hundred and fifty national banks transacting business in Kansas as complainants. Upon demurrer being filed to this bill, District Judge POLLOCK overruled the demurrer and granted an interlocutory injunction on the theory that the bill conferred jurisdiction upon the court because the construction of the national banking laws was involved. On appeal from this order to the circuit court of appeals of the eighth circuit, the case was heard by Circuit Judges HOOK, VAN DEVANTER, and ADAMS, and in an opinion written by Judge HOOK, unanimously agreed to by the court, the decision of the circuit court was reversed and the validity of the law sustained. Many of the questions considered in that case are involved in this suit, and the opinion, therefore, is entitled to great consideration upon those questions. J. N. Dolley, as Bank Commissioner of the State of Kansas, *et al.*, v. Abilene National Bank, of Abilene, *et al.*, 179 Fed. Rep. 461.

In its statement of the case the court said:

"The questions before us require no more than a brief outline of the provisions of the statute. There are many details of the guaranty scheme of which much complaint is made, but we think they are so clearly matters with which the national banks have no legal concern, or are so manifestly within the legislative province of the state, it is unnecessary to mention them. The statute authorizes banks incorporated under the laws of the state and possessing prescribed qualifications to join in contributing to and maintaining a fund for securing certain classes of their depositors against

loss. The administration of the law is committed to the bank commissioner, the custody of the fund to the state treasurer. Whether a bank shall become a party to the scheme is optional, not compulsory. Its desire to join is signified by a resolution of its board of directors authorized by its stockholders. If upon an examination of its affairs by the bank commissioner it is found to be qualified, it then contributes to the permanent guaranty fund a sum in bonds or cash proportioned to the deposits to be guaranteed and receives a certificate that it has complied with the provisions of the act and "that its depositors are guaranteed by the bank depositors' guaranty fund of the state of Kansas." The permanent fund is raised to a fixed amount by the initial payments and, if necessary, by annual assessments of one-twentieth of one per cent of the guaranteed deposits in each bank, less capital and surplus; and any depletion of the fund caused by payments to depositors in insolvent banks is cared for by like assessments, not exceeding five in any calendar year. When a guaranteed bank, so-called, becomes insolvent, the bank commissioner takes charge, winds up its affairs, and applies its assets and the moneys realized from the liability of its stockholders. When these are exhausted, balances still due guaranteed depositors are paid in full from the guaranty fund if it is sufficient, and if not, then by continued assessments, not exceeding five annually, as above stated, upon all banks which are parties to the plan. It is also provided that national banks may avail themselves of the act upon compliance with the prescribed conditions.

"In their final analysis the objections of the national banks to the Kansas statute are reduced to two propositions: First, . . . ; and, second, that the effect of the guaranty plan will be to attract depositors from the national banks to the guaranteed state banks, and will, therefore, impair the efficiency of the former as instrumentalities of the national government. Counsel admit this to be their position. The federal questions presented by these propositions constitute the ground of jurisdiction of the circuit court, and upon their soundness rests the temporary injunction it granted."

In considering the classifications made by the law, the court said:

"The equality clause of the amendment does not re-

quire indiscriminate operation of state laws, but proceeds upon due consideration of the relations of persons to the state and to the legislation in question. 'It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liability imposed.' (Maggoun v. Illinois Trust & Savings Bank, 170 U. S. 283; Home Insurance Company v. New York, 134 U. S. 594; Hayes v. Missouri, 120 U. S. 68.)

"In *Barbier v. Connolly*, 113 U. S. 27, it was said: 'Class legislation discriminating against some and favoring others is prohibited, but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment.' Such has been the consistent holding of the supreme court. This is not the ordinary case of classification for legislative purposes. The power of a state to classify implies jurisdiction of the various objects to be classified, and the voluntary selection of some of them for inclusion within the law. Even in such cases a classification when made will be upheld whenever it is not purely arbitrary or capricious but proceeds upon some difference which has a just and reasonable relation to the purpose sought to be accomplished. (*Railway Co. v. Ellis*, 165 U. S. 150.) . . . A state has the right to confer corporate powers upon its own corporations, and its action cannot be held in contravention of the equality clause of the fourteenth amendment merely because like corporations of the United States cannot, by reason of their organic structure and the duties they owe their creator, avail themselves of them. The State of Kansas did not single out national banks as the special object of hostile or discriminative legislation, and no such conclusion can be helped out by averments of intention in a bill of complaint."

In considering the indirect effect of the law upon the business of the national banks, as well as banks which do not belong to the guaranty fund, and the right of such institutions to be heard in a suit in equity, the court said:

"The effect of the Kansas statute upon the business

of the national banks will at the most be indirect and incidental. Whether there will be any appreciable effect at all depends upon the individual views of depositors which ordinarily are influenced by many things pertaining to banks and bankers and their methods of conducting business. There can be none in a legal sense of which a court can take cognizance in a case like this. Ground for complaint would exist if the statute had, for instance, made it an offense to deposit funds in national banks or subjected them to a higher rate of taxation than that imposed on like deposits in state institutions, or in some other perceptible way had evinced an evil and discriminating purpose, or an attempt to subject them to rules consistent with those prescribed by Congress. . . . We have not considered the merits of the guaranty plan, whether practically beneficent, experimental or illusory. Such matters are for the state legislature; our province is confined to the question whether the exercise of its power is within constitutional limits so far as the national banks are concerned. We think the objections they urge are so clearly without foundation the temporary injunction was improvidently granted."

ARGUMENT.

As the hearing occurred on a demurrer to the bill, there was nothing involved except a consideration of the statute in question and the interest of the complainants as affected by the statute. We will first consider matters in the bill which may or may not be admitted by the demurrer.

It is well established in courts of equity that the demurrer admits all facts which are well pleaded. The converse of this statement must also be true, and we quote from two of the leading cases decided by this court the rule controlling upon this question. In the early case of *Dillon v. Barnard*, 21 Wall. 430, the court said :

"A demurrer only admits facts well pleaded; it does not admit matters of inference and argument, however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument when the instrument itself is set forth in the bill or a copy is annexed, against a construction required by its terms, nor the correctness of the ascription of a purpose to the parties when not justified by the language used. The several averments of the plaintiff in the bill as to the constitutionality of his rights, and of the liabilities and duties of others under the averment given, therefore, exert no influence upon the mind of the court in the disposition of the demurrer."

In the very recent case of *Equitable Life Assurance Society v. Brown*, which will appear in 213 U. S. 25, and reported in advance sheets of U. S. Reports, No. 1, the court in the syllabus said :

"A demurrer only admits facts well pleaded in the pleading demurred to; it does not admit the pleader's conclusions of law or the *correctness of his opinions as to future results.*"

Further on in the opinion, at page 43, Mr. Justice PECKHAM, speaking for the court, said :

"As the questions in this case arise upon the defend-

ant's demurrer to the bill of the complaint, it is necessary to direct attention to the effect of a demurrer as an admission. We are not called upon to cite authorities for the statement that a demurrer only admits facts well pleaded in the pleading demurred to. It does not admit the pleader's conclusions of law, nor does it admit the correctness of any opinion set forth in the bill, as, for instance, in regard to the probable effect in the future of the continued control of the defendant by the interests existing therein up to 1906. Hence, any construction pleaded by complainant upon the charter of the defendant and the insurance policy issued by the defendant to the complainant is not admitted, nor is the allegation of the ownership of the surplus by the policyholders as alleged by the complainant, nor any opinion which is expressed in the bill as to the ability of the defendant to continue business, nor is any other opinion as to future happenings admitted by the demurrer."

From the above quotations it will be seen that averments construing the provisions of the chapter under consideration are not admitted by the demurrer; neither are statements in the bill which are conclusions of law; neither are averments relative to the future effect or consequences of putting the law into force. This is especially true where the averments as to future consequences are in their nature speculative.

If the act provides a specific penalty for its violation, or a failure to do a certain thing in the manner prescribed, then a statement in the bill that if the complainant should disregard the act the consequences or penalty fixed therein would be inflicted or attempt to be inflicted upon him is a proper pleading of a necessary consequence. But if the deleterious result is not directly or indirectly provided in the act, and is the expression of the opinion of the pleader, the demurrer does not admit the truth of such fact, no matter how well it may be expressed.

In the first place, the oft-repeated averment in the bill, that all of the assets of an insolvent bank, and all of the double liability of the stockholders, shall, under the law, be applied exclusively to the payment of the

claims of guaranteed depositors before any other depositor or creditor may share in any way in the assets or funds of the bank, will not be taken as a statement of fact admitted by the demurrer, because the act itself is attached to the bills and the court is more competent to construe the language of the act than counsel.

Nor will the statement in paragraph 3 of subdivision IV of the bill, to the effect that the purposes of the bank guaranty act is, by way of direct and indirect compulsion, to require all existing incorporated state banks to accept the provision of said act, be admitted. Under the rule as laid down by Mr. Justice PECKHAM, this is a pleader's conclusion. Later in the same paragraph the statement is made that a new bank may be given preferential rights "to the detriment and disadvantage of the existing banks of said city or town." None of such matters are admitted, because they are only speculative statements giving the opinion of the pleader as to what would be the result of an enactment looking at it from his own view-point.

In the above we have not attempted to select all of the averments which are not admitted under the rules laid down by the supreme court. The court will find many others which will be readily suggested in the reading of the bill. In the interest of time and space we have culled out a few of the most apparent, knowing that the court will apply the rules of pleading to any and all averments falling under the condemnation of the above rules.

JURISDICTION.

COMPLAINANTS DO NOT SHOW AN INTEREST THE NATURE OF WHICH ENTITLES THEM TO QUESTION THE CONSTITUTIONALITY OF THE STATUTE ATTACKED BY THEM.

Complainants show that a number of banking corporations organized by virtue of the state laws do not choose to avail themselves of the provisions of the law, and a few of the banks claim that they are not ad-

missible to the benefits of the guaranty fund unless they make some change in the amount of surplus now carried by them.

No private property right is infringed by the law, unless it be that under the operation of the several classes of banks allowed by this law one class will have the advantage over the other in business. This is a matter which appeals purely to the business judgment of men. It is a question over which there is much difference of opinion, and is, therefore, one which must be determined solely by the legislature of the state. The legislature of Kansas did not go so far as to attempt a solution of the question absolutely for all men, but left it open for each bank and class of banks to decide for themselves. In other words, this is a question concerning the political policy of the state upon a matter within the police power, and it presents no injury to the private property rights of the complainants which entitles them to relief in a court of equity.

No attempt at an exhaustive discussion of this elementary principle will be made. We shall be content to call the attention of the court to pertinent quotations from well-known cases upon this proposition.

In the famous case of *Marbury v. Madison*, 1 Cranch 137, the court said:

"A legal remedy by suit in equity or by action at law is available whenever a legal right is invaded."

The question of what constitutes a legal right, so as to enable a party to complain of a statute as unconstitutional, has often been the subject of determination by the courts.

The rule as gleaned from all of these decisions is stated in *Cyclopedia of Law and Procedure*, volume 8, page 787, as follows:

"It is a firmly established principle of law that no one can be allowed to attack a statute as unconstitutional who has no interest in it, and is not affected by its provisions. This rule applies to all cases both at law

and in equity and is equally applicable in both civil and criminal proceedings. All constitutional inhibitions against the taking of private property without due process of law, and all constitutional guarantees of equal rights and privileges are for the benefit of those persons only whose rights are affected and cannot be taken advantage of by any other persons."

With respect to discriminations this work continues:

"The denial of equal rights and privileges by discriminating legislation can be pleaded only by those who can show that they belong to the class discriminated against. This has been held in numerous cases, and the rule applies to all cases affecting civil cases of every kind and to all cases in which property rights alone are affected."

In the case of *The State v. Smiley*, 65 Kan. 240, Chief Justice DOSTER used the following language:

"He [the defendant] cannot be heard to object to the statute merely because it operates oppressively upon others. The hurt must be to himself. The case, under appellant's contention as to this point, is not a case of favoritism in the law. It is not a case of exclusion of classes who ought to have been included, the leaving out of which constitutes a denial of the equal protection of the law, but it is the opposite of that. It is a case of the inclusion of those who ought to have been excluded. Hence, unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint. This is fundamental and decisively settled."

This case was appealed to the supreme court of the United States and there affirmed (*Smiley v. Kansas*, 196 U. S. 447), and Mr. Justice BREWER, who wrote the opinion, incorporated into it with approval the part of Justice DOSTER's opinion quoted above.

It is clear then from this case that where the legislation does not directly affect the property rights of the complainants they have no standing in court.

If a party will not be heard to complain of an unconstitutional statute because he does not bring himself within its constitutional provisions, he could not be heard to complain of a statute which upon its face

offers to leave him entirely alone and not to interfere with his business in the slightest degree. The statute in question offers to all incorporated banks the right to participate in the fund upon reasonable conditions, and to all those who do not care to comply with those conditions the law says, you may enter if you desire, but if not, you may go your way in peace.

It is answered by the complainants that the law will give to those banks which are admitted more favorable business conditions than it would leave for those who do not enter the fund and to national banks; that this will injure the business of each bank and what one bank could complain if all of the banks may complain jointly, and that what they complain of is a general injury to the business of national banks and certain state banks.

First, it may be said that no one has a right to complain because some regulation within the police power of the state may reflect injuriously upon his business. Such a contention would avoid all of the license and inspection laws and other attempted regulations of public businesses.

As to the banks bringing this suit, it may be said that the requirements for entering into the guaranty fund are not materially different from many of the requirements of the general banking law of the state, and they ought not to be heard to complain of something which they do not care to comply with.

Indeed, it has been held by this court (*Bank v. Pa.*, 167 U. S. 461) that discriminations cannot be complained of where the want of uniformity *is the result of the deliberate action of those complaining of it.*

The state of Pennsylvania, in the year 1891, passed a law by which it gave to the different banks doing business within the state the privilege of collecting from their stockholders a tax of eight mills on the dollar of the face value of the capital stock of the bank, and putting it into the state treasury, in lieu of all tax assessments, and further providing that, in case they

did not elect to collect the eight mills taxes from the stockholders, the uniform tax of four mills on the dollar should be levied upon the actual cash value of the capital stock of all banks doing business in the state.

In 1895 the validity of this law was before the supreme court of Pennsylvania, in the case of *Commonwealth v. Merchants & Manufacturers National Bank*, 168 Pa. St. 309, 31 Atl. 1065, and the law was there upheld. In the body of the opinion Mr. Justice WILLIAMS, speaking for the court, says:

"It proposes to relieve all the banks from local taxation that elect to pay a certain rate per cent upon their shares of stock directly into the state treasury. All the banks may come into this class. All that do are assessed with a uniform rate per cent, which they pay at one time and one place. Those that elect not to pay this rate are assessed at a lower and uniform rate upon the appraised value of their shares, and upon this valuation the local as well as the state taxes are assessed. We cannot say that this classification is unconstitutional, nor that the rate per cent differs so widely as to invalidate the law. The rate is uniform for each class, and the aggregate of the taxes levied per share in both classes is as nearly the same as could well be estimated in advance of the action of the local authorities, which it is impossible to forecast with accuracy. The banks are themselves responsible for the existence of the second class. They are all invited to deal directly with the state. If they do not, it is fair to assume that their action is guided by what they believe to be their own pecuniary interest. Of a want of uniformity, which is the result of their own deliberate action, they certainly ought not to complain. Of a want of equality of burden that results from circumstances affecting particular banks, and is not produced by the application of the law, they cannot complain. We think the learned judge decided this case correctly, and the judgment is now affirmed."

This case was afterward before the supreme court of the United States, by appeal, and is entitled "*Merchants & Manufacturers Bank v. Pennsylvania*, 167 U. S. 461, 18 Sup. Ct. Rep. 221," and there the constitutionality of the law under the equal protection clause

of the fourteenth amendment to the federal constitution was raised and decided. The opinion in the case was delivered by Justice BREWER. In the syllabus the court said:

"There is no lack of uniformity of taxation under that act which renders it obnoxious to that part of the fourteenth amendment to the federal constitution which forbids a state to 'deny to any person within its jurisdiction the equal protection of the laws,' as the right of election which, if not availed of by all, may produce an inequality, is offered to all.

"That act treats state banks and national banks alike; gives to each the same privileges; and there is no discrimination against national banks as such."

In the opinion the learned judge says:

"Again, it will be perceived that this inequality in the burden results from a privilege offered to all."

On principle no question of discrimination or lack of equal protection under the law can be raised where the right to take advantage of the privileges or accept the burdens imposed by the law is voluntary so that the different institutions belonging to the class may or may not, as they see fit, avail themselves of the privileges or assume the burdens granted or imposed by the law. The principle was so tersely and plainly laid down in the syllabus in the Pennsylvania case that there can be no controversy between these complainants and the state of Kansas as to the right of the state to continue the operation of the bank guaranty law.

Besides all this, the principle is universally recognized that one who is not injured as to his private interests may not bring a suit to test the constitutionality of a law for the benefit of the public generally. As bearing upon this discussion, it will be noted that in one part of their bill complainants seriously allege an injury to their business interests arising out of the more favorable terms upon which guaranteed banks will be allowed to transact business. In the latter part of their bill they allege that the law is a fraud upon the public, the security offered is insufficient, and will re-

sult in harm and disaster to the banks which undertake to comply with its provisions. Upon which of these inconsistent statements do the complainants stand? Are they seeking to enjoin the law because of some injury to their property interest, or are they seeking to enjoin it for the good of the public generally?

"Alleging inconvenience to private parties in common with the public in general occasioned by the exercise of a right conferred by law for the benefit of the public, gives them no right to damages."

Hamilton v. Vicksburg S. P. R. Co., 119 U. S. 280.

On this branch of the case we call the attention of the court also to the following authorities:

Turpin v. Lemon, 187 U. S. 51. (Opinion, p. 60.)

"This is an effort to test the constitutionality of a law without showing the plaintiff had been injured by its application." (*Branton Co. Ct. v. W. Va.*, 208 U. S. 192.)

THE RIGHTS OF COMPLAINANTS AS TAXPAYERS.

It is a well-established proposition that a private citizen and taxpayer will not be permitted to enjoin the acts of a public officer, even though it be admitted that such public officer is acting under the authority of an unconstitutional law, unless it be further shown that some private property interest of the individual is injured.

"A court of chancery has no jurisdiction to interfere with the public duties of any department of government, except under special circumstances and where necessary for the protection of rights of property.

"Equity will not interfere by injunction to restrain persons from exercising the functions of public officers on the ground of the want of binding force in the law under which their appointments were made, but will leave that question to be determined at law."

Sheridan v. Colvin, 78 Ill. 237.

See, also, *Thompson v. Canal Fund Comm'r*, 2 Abbott's Prac. 248.

Mr. Chief Justice FULLER, in *Arkansas Building &*

Loan Asso. v. Madden, 175 U. S. 269, states the rule as follows:

"The rule is that the collection of taxes under state authority will not be enjoined by a court of the United States on the sole ground that the tax is illegal, but it must appear that the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case within some recognized head of equity jurisprudence."

Many cases are there cited in support of this principle.

The complainants in this case, however, claim they have a right to maintain this suit under the authority of *The City of Hutchinson v. Beckman*, 118 Fed. 399. The opinion in this case is by Judge THAYER, and covers the entire question of the right of the taxpayer to maintain a suit against a tax alleged to be unconstitutional. We claim it is clearly shown in that case that these complainants cannot maintain their bill. They do not show any injury or interest in the case or any attempted interference with their business, of any kind or character, except the bare assertion that illegal taxes will be collected and applied under this law. The fact of the interference with their business is conceded to be only such interference as occurs from increased competition with the "safety fund" state banks. This matter has been elsewhere disposed of in this discussion, and therefore leaves complainants depending solely upon the claim of an illegal tax for interest sufficient to support the bill. The bill in this case even admits that the amount of alleged illegal tax does not, and never will, exceed \$2000 as to each of the complainants. Now Judge THAYER, in the case referred to above, after stating that suits to enjoin an illegal tax will not be entertained where the amount in controversy is less than \$2000, makes the following statement:

"The present case is distinguishable from the cases relied upon by the complainants in that the tax involved is a license tax imposed by a municipality upon a busi-

ness concern, the payment of which tax may be enforced by fining and imprisoning its employees and by daily arrests that will seriously interfere with the prosecution of complainant's business and inflict a much greater direct loss than the amount of the tax. The suit at bar, in view of the allegations touching the effect upon the complainant's business, if the city is permitted to proceed with the enforcement of the ordinance in its own way, is in reality a bill to prevent the city from breaking up and destroying an established business under the guise of enforcing an illegal ordinance."

We understand, of course, that the burden is upon complainants to show by their bill conclusively that the law will result in an unconstitutional act before they have any authority whatever to raise the question in a court of equity, and then they must show, in addition to that, that the amount of illegal tax will exceed \$2000 as to each complainant and that additional reasons in equity exist authorizing a court of equity to take cognizance of the case.

"But in order to bring taxation imposed by a state or embraced within its authority within the scope of the fourteenth amendment of the national constitution, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exercising the power to tax."

Henderson Bridge Co. v. Henderson, 173 U. S. 614-615.

A CONSIDERATION OF THE PROVISIONS, CLASSIFICATIONS AND ALLEGED DISCRIMINATIONS OF THE BANK GUARANTY LAW.

Complaint is made in the bill, and at previous hearings, of the classifications contained in chapter 61. All kinds of opprobrious epithets are applied in the denunciation of these classifications. But, as has been frequently said, the number and forcefulness of the adjectives used do not add to the force of averments, and we apprehend that, although the classifications in this

chapter are denounced as being unfair, unjust, perfidious, arbitrary, immoral, preferential, unscientific, unconstitutional, unbusinesslike, diabolical and nonsensical, the court will consider these classifications along legal lines for the purpose of ascertaining whether they are arbitrary to such an extent as to encroach upon the constitutional rights of the complainants here before the court.

The basis of the power of the legislature to create classes is declared in *Santa Fe v. Matthews*, 174 U. S. 106:

"The power of classification is upheld whenever said classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished."

The purposes of the guaranty law fall naturally into two divisions: First, it was sought to protect the integrity of the safety fund by excluding any unsafe banks. Second, it was necessary to fix the amount to be charged or contributed by any bank joining the fund on an equitable basis.

Before proceeding with the detailed discussion of the objections urged against these classifications, we call the attention of the court to other statements of general principles relative to the power of the legislature in creating classes.

"Whenever a law operates alike on all persons and property similarly situated, equal protection cannot be said to be denied." (*Walston v. Nevin*, 128 U. S. 582.)

In the *Matthews* case, referred to above, it was said:

"It is the essence of classification that upon the class are cast duties and burdens different from those resting upon the general public."

Keeping in mind then the objects of the legislature in creating these classes, and these general principles, we proceed to discuss the many classifications complained of by complainants.

First. We have the general classification between banks themselves. The act provides that incorporated

banks may participate in the fund and, therefore, all others are excluded. Has the legislature authority to create a classification of banks based upon incorporated banks and those not incorporated? The very fact of incorporation itself creates such a class, and it has been held that the state in the exercise of its police power may even prohibit banking to any but incorporated banks.

State of North Dakota, *ex rel.*, v. Woodmanse, 11 L. R. A. 420, and the many cases and authorities there cited.

The states in the regulation of the business of banking have found it much more convenient to control the amount of surplus, reserve and capital and their relation to deposits by means of incorporated banks than by banks controlled by private parties, and for this reason alone, in determining the soundness of the bank and fixing the charge for controlling the fund, the incorporated bank was to be preferred over the private bank. Indeed, the legislature thought that there was no way of obtaining accurately and with precision the amount of risk the fund would assume by guaranteeing the deposits of a private banker, and no way of fixing equitably as to other banks what he should be charged for entering into the fund. He was not denied admission to the fund, however, because by becoming incorporated under the general banking act he could participate in the fund. There was no discrimination against him to any greater degree than the general banking law discriminated against him, and it is a matter of common history that the general banking act of 1891 practically forced the private bankers out of business in Kansas, and either by inducement or discrimination resulted in practically all of them coming under the terms of the general law. This was all the bank guaranty law asked of private bankers and offered them the benefit of the fund as a premium for becoming incorporated and complying with the other general banking laws of the state. Finally, as to private banks, there are no private banks complaining here in this suit.

Second. Within the general specifications of incorporated banks are other classifications. As, for instance, found in section 1, it must have a paid-up and unimpaired surplus fund equal to ten per cent of its capital. In support of this, we believe it is sufficient to say such a classification is necessary to sound banking. It has been the policy of the state to require the building up of a surplus fund by the banks operating under its law; it has also been the policy of the federal government to build up a surplus fund in the national banks. It is therefore the public policy of both state and federal governments in the interests of safe banking.

Section 32 of chapter 11a, Laws 1901 of Kansas, having been enacted in 1897, is as follows:

"The directors or owners of any bank doing business under this act may declare dividends of so much of the net profits of their bank as they shall judge expedient; but each bank shall, before the declaration of a dividend, carry one-tenth part of its net profits since the last preceding dividend to its surplus fund, until the same shall amount to fifty per cent of its capital stock."

The same provision was in the banking law of 1891, being section 30 of chapter 43, Laws of 1891, so the question of building up a surplus is not a new question incorporated for the first time in the law under consideration. As to the amount of surplus required, that would properly be a matter of detail within the province of the legislative body. The matter of capital and surplus and their relation to deposits is necessary to be considered in finding the amount required to be contributed by each bank.

Third. The next classification under section 1 of the act is, that the bank which becomes authorized to do business after the passage of the act must be continuously in the banking business for at least one year. The provision specifically says: *"Any bank which may after the passage of this act be authorized to do business in this state."*

So that under the act a bank which may have been organized thirty days before the passage of the act, if it complies with the other provisions of the act, as to surplus, etc., would be admitted. The bank which was organized after the passage of the act surely has no cause of complaint, because it took its charter knowing that it could not participate in the fund until after it had been organized and actively engaged in the banking business for one year. That provision became a part of its charter at the time it was granted.

Fourth. A further classification in section 1 is a provision to the effect that the one-year limit should not apply to banks organized in any city or town in which all of the banks shall have neglected or failed for a period of six months after the taking effect of the act to avail themselves of its provisions.

From the title of the act it purports to be for the security of depositors, and the whole act is built up around the proposition of securing the depositors. The legislature, in its wisdom, had the right to provide that any community tributary to a town or a city where the established banks, for a period of six months, did not see fit to avail themselves of the benefits of the act, a community made up largely of the depositing class, should not be deprived of the benefits of the security fund by reason of the fact that no bank in their community saw fit to qualify under the act; therefore the law-making power saw fit to allow newly organized banks to come under the law, thus extending the benefits of the act to the depositors in that community, the new bank being required to submit to the necessary examinations, comply with all of the other provisions, have an actually paid-up and unimpaired surplus fund of ten per cent of its capital stock, and all of the other safeguards provided in the law. It seems to us, in view of the objects and intent of the act, this is a detail and a classification which comes fairly within the power of the legislative body, and a court will not say it is unjust or arbitrary.

Fifth. Complaint is made also that the board of directors have no discretion in passing the resolution seeking to be admitted to the fund—that the action of the board of directors becomes compulsory and without discretion after the stockholders have instructed them to pass the necessary resolution. We are of the opinion this situation cannot embarrass the court. It is a matter of detail in the internal workings and management of the bank. The directors are but the servants of the stockholders, and under the law must be a part of the stockholders; therefore they, as stockholders, participate in the deliberations of the more democratic body, which orders or authorizes the necessary resolution.

Sixth. The objections which are made as to the amount of assessment required, the amount of bonds required to be deposited in the good-faith fund, are matters of detail for the law-making power, and upon which different minds may reasonably differ, but are not of such a nature as to in any wise invalidate the law as such.

In section 2 will be found the provision as to the amount of bonds to be deposited in the good-faith fund, and the amount of actual assessments. Complainants complain of the provisions of this section because no assessment shall be less than twenty dollars, and no amount of bonds deposited less than five hundred. This complaint could only be heard coming from a bank within that class which had applied for admission to the benefits of the act. At least, it is not shown in the bill that any detriment comes to any of the complainants by reason of that provision; that the provision is not arbitrary, it has been a part of the policy of all states and the national government to fix minimums and maximums in amount of payments required to be made, so long as it treats all in the class the same.

Seventh. In section 4 is found a classification as between depositors, that upon the insolvency of the bank the depositors, without regard to whether they are in

the class guaranteed or not, receive certificates of the amount due them bearing six per cent interest, except where a different rate of interest has been agreed upon between the bank and the depositor, that rate shall prevail in the certificate.

Under the law of banking, all deposits which are subject to check are due on demand. If a bank becomes insolvent it does not pay on demand. Therefore, the deposit is due. Under the law of Kansas all past due indebtedness bears interest at the rate of six per cent per annum, unless a different rate has been agreed upon between the parties, and then that rate prevails. This provision is but a repetition of the law of contracts, which has been the law of the state of Kansas for many years.

This section also provides that after all of the assets of the bank and the double liability of the stock has been paid to the depositors, if there is a deficiency, the bank commissioner shall give his check, countersigned by the state auditor, to those depositors holding certificates for funds which were subject to guaranty, for the balance due them in full, to be paid out of the bank guaranty fund. No discrimination is there made against the distribution of the assets as such, nor the moneys derived from the double liability of the stockholders. These are distributed as theretofore provided by law under section 461 of the General Statutes of 1901, as amended by section 7 of chapter 59 of the Laws of 1909.

The contention of counsel that the word "depositors," as used in section 4 of the guaranty act, was meant and would operate to the exclusion of other creditors, is unwarranted, either by the reading of the section or by the history of the banking laws, in view of section 7 of chapter 59. No change has been made by the bank guaranty law in the distribution of the assets of the bank, and the amount realized from the double liability of the stockholders. That remains as it was before. After that has been distributed, those depositors who

come within the guaranteed classes (and all depositors may come within those classes if they see fit) are paid the balance of their claims, if any, out of the bank guaranty fund. No right which any other creditor had is taken from him.

In the bill, in several different places, it is stated specifically that under the bank guaranty law all of the assets of the bank of every kind and character, all of the funds derived from the double liability of stockholders, and all credits and bills receivable, would, under this law, be applied, first, to the payment of the *guaranteed* deposits, to the exclusion of all other depositors or creditors.

In reply to these averments we answer, in no event can the law bear the construction claimed in the bills of complaint, such a construction being entirely foreign to the wording of the section.

In section 4 is found the provision upon which they base their claim, as follows:

"After the officer in charge of the bank shall have realized upon the assets of such bank and exhausted the double liability of its stockholders, and shall have paid all funds so collected in dividends to the depositors, he shall certify all balances due on *guaranteed deposits*, if any exist, to the bank commissioner."

It then provides that the bank commissioner shall pay this balance out of the guaranty fund. In the first instance, the court will see that the persons to whom the assets of the bank and the money derived from the double liability are to be paid are *depositors* without limitation. Further on in the quotation, where the list is provided for the bank commissioner to pay out of the guaranty fund, it uses the words "*guaranteed depositors*." It might be that the first word "*depositors*," as used in the quotation, would have better expressed the meaning of the legislature if it had been "*creditors*" instead of "*depositors*," in view of the other provisions in the banking law; however, a court, in construing such a provision, which seems to be pointing out simply

the procedure to be followed by the receiver, and which must necessarily follow any other provisions of the banking law, will construe that provision to mean either a payment of the assets and the double liability to all of the creditors of the bank, or that it meant only that proportion of the assets which should, under the general law, be applied to the depositors, not excluding other creditors, and when such *pro rata* had been applied to its full extent in the payment of such claims, then the balance due to "*guaranteed depositors*" should be certified to the bank commissioner.

In section 461 of the General Statutes of 1901 it was provided that all sums collected from the double liability of the stockholders should be distributed *pro rata* to the creditors in the same manner as other funds. By section 7 of chapter 59 of the Laws of 1909 section 461 was amended, but no change was made affecting the manner of distributing the assets of an insolvent bank. That provision remained unchanged, and is retained in the new section in these words: "All sums so collected to become a part of the assets of such bank, and to be distributed *pro rata* to the creditors thereof in the same manner as other funds."

This provision is exactly the same contained in section 461 of the Laws of 1901.

Chapter 59 of the Laws of 1909 was approved March 5, 1909, and published March 8. The bank guaranty law was approved March 6, 1909, and published March 10, but both laws were passed at the same session of the legislature, as a part of the bank regulation and control by the state; both chapters forming a part of the one general plan of bank control. It cannot be said that through the use of the word "depositors" in section 4 of the bank guaranty act it was intended to thereby take away from any creditor his *pro rata* share of the assets of the bank, including the double liability of the stockholders. Courts give such construction to statutes, and especially those passed at the same session

of the legislature and as a part of the same general plan, as will harmonize them.

Again, while in the bill they say in general terms that they are creditors of banks which are now in the bank guaranty fund, and of banks which are out of the guaranty fund, and of banks which will in the future come under the provisions of the guaranty fund, and that they will in the conduct of their business become such creditors in the future, they do not state definitely in what way they are such creditors. The only way pointed out by which they become creditors is by the making of deposits in these different banks; therefore, we take it that they have not placed themselves in a position to claim any rights under that provision, even though the court should hold it to the narrow construction claimed for it by complainants. That question could only arise upon the insolvency of a bank, when a creditor came into court demanding his right of a *pro rata* distribution of the assets of the bank, showing that such distribution had been refused.

The word "depositor" as used in section 4 of the bank guaranty act, in connection with the other statutory provisions relating to banks, is broad enough, and the court will construe it to mean any creditor of the bank.

"A statute must be construed with reference to the whole system of which it forms a part."

The bank guaranty law upon its enactment became part of the general banking system and policy of this state. The legislative object in that particular chapter was not the distribution of the general assets of the bank, but the formation of a bank guaranty fund to be applied in payment of balances due depositors after the application of the general assets of the bank.

Section 7, chapter 59, passed at the same session, treated particularly of the distribution of the assets, and in no wise providing for a guaranty fund. That section was a part of the banking plan and provided for the distribution of the assets *pro rata* among the credi-

tors in the same manner as had been provided continuously since 1897. That being a direct statement of the legislative intent, it will stand as against an indirect statement as contained in section 4 of the guaranty act upon that particular subject.

Eighth. We next come to the character of the deposits which may be guaranteed under the law. This classification is found in section 6. The first is: Deposits which do not bear interest. This classification takes the great bulk of the deposits in banks of money which is intended to be used from day to day in the transaction of the commercial business of the world. It is the blood running through the arteries of commerce, which, if it is in any way obstructed, not only obstructs the banking business, but every other class of business in a community, or in the state at large, or the government, depending only upon the extent to which it is obstructed. These deposits are the merchant's account in the bank, upon which he checks from day to day to pay his bills as they come due, to keep his business in operation. These deposits are those which the lawyer, the mechanic, the farmer, the doctor, the preacher, the laboring man, and every class of citizens, keep in the bank for the purpose of paying the bills contracted by them in favor of the merchant, the butcher, the laborer, the mechanic and every other class with whom he has business connections.

On the other hand, the daily deposits which bear interest are, as a rule, those which are not used in the daily transaction of the commercial business of the state or of the nation. They are funds which are expected to remain for some indefinite time in the bank. The clogging of this artery, while it would inconvenience the particular persons, would not stop or retard the business of the community. These seem to our mind to be sufficient reasons for placing deposits which do not bear interest, the very life of the trade of the nation, in a preferred class, so that in case of insolvency the merchant receives immediately his certificate,

bearing six per cent interest. He knows this certificate will be paid in full. He may, if he sees fit, use it as a cash item. Any other bank would be glad to receive the certificate and give him credit therefor, and his checking deposit, which was yesterday in A. Bank, is to-morrow in B. Bank. His ability to pay his commercial bills as they fall due is not interrupted.

On the other hand, if deposits upon which interest on the daily balance is paid are placed in the guaranty fund, it would encourage banks to offer as high a rate of interest as possible upon daily balances for the reserve of other banks, which is acknowledged by all banks to be dangerous banking.

The next classification is: "Time certificates not payable in less than six months from date, and not extending more than one year, bearing interest at not to exceed three per cent per annum, and on which interest shall cease at maturity."

In this class of deposits is included, to a large extent, especially in those cities where there are no savings-banks, the smaller deposits of the laborers, the widows, the depositor of small means, and as a rule include the entire earnings of the class to which they belong.

The next class, as shown by section 6, is: "Savings accounts not exceeding in amount one hundred dollars to any one person, and not subject to check, upon which the bank has reserved in writing the right to require sixty days' notice of withdrawal, and bearing interest at not to exceed three per cent per annum." This class takes in the purely savings deposits. The history of the savings-banks is, that they represent the daily or weekly savings of the laboring or industrial classes, outside of the merchants, or those who use their money daily in the conduct of their business—the clerk, the serving-woman, the day laborer, the mechanic, and all classes whose savings are small, but who desire to build up for some unfortunate day as much of a bank account as possible. This class and the class next preceding should in all reason have the especial protection

of the law. The legislature, in its wisdom, has the power to make such a classification so long as this right applies to every one in the class, and so long as any other citizen may enter this class if he desires.

We also find in section 6 those deposits which are not within the benefits of the bank guaranty act, and first, those which are primarily rediscounts. If A. goes to B. Bank, desiring to borrow one thousand dollars, the bank takes from him such security as it sees fit, and loans him the money, and takes his note therefor; A. then owes B. Bank one thousand dollars. If, afterwards, B. Bank desires to realize upon this note before its maturity, it takes the note to C. Bank, together with such security as A. gave, and sells the same to C. Bank and indorses it. This is a rediscount. C. Bank takes the note upon the faith of A. and the security which he has offered to B. Bank, looking, however, to the indorsement of B. Bank, and even though the two banks treat it as a deposit by C. Bank in B. Bank, C. Bank has, in addition to what any other depositor would have, the note and security of A. for the repayment of its money or deposit. There is no reason why such a deposit should be guaranteed, because the transaction is simply a business transaction, the same as if one broker would sell a note to another. If the note of A. and the security offered by him is not sufficient, then B. Bank would refuse to loan him the money in the first instance, and C. Bank would not take the note from B. Bank.

Next, we have "money borrowed by the bank." Under the authorities, all deposits are a loaning of money to the bank, but the ordinary deposit has been by banking law and banking usage classified, and is not looked upon as a general borrowing of money, because the amount of the deposit is subject to check, while in the ordinary borrowing of money there is time limit when the return may be demanded, and that is the kind of borrowed money referred to in section 6. If B. Bank desires to borrow money from C. Bank, or from any

other institution or person, they treat with each other the same as any individuals who desire to borrow money. None of these classes of deposits could equitably be guaranteed on the same terms as ordinary deposits.

Under section 446, chapter 11a, Laws of 1901, a bank is permitted to borrow money for temporary purposes, not to exceed fifty per cent of its paid-up capital, and may pledge assets of the bank not exceeding twenty per cent in excess of the amount borrowed as collateral security therefor; therefore, if B. Bank desires to borrow money of C. Bank, the latter has the right to demand security for the loan, and if it is safely secured—and whether it is or not is a matter of business discretion between the banks—it would not seem that it was necessary to further secure it by placing it in the guaranty fund, because in case of insolvency the loaning bank has its collateral which it may exhaust to the exclusion of all other creditors.

The next class of deposits which are not guaranteed is "all deposits otherwise secured." This takes largely state funds, county funds, city funds, school district and other municipal funds. The law allows these municipalities, upon depositing their money in banks, to take security therefor. For all of these deposits, except state deposits, the security must be outside of the assets of the bank. For the state deposits the security is municipal bonds, which are a part of the assets of the bank. In case of insolvency, these municipalities may resort to their specific security and obtain their money. The state resorts to the bonds deposited with it as security, and obtains its money. Therefore, if these municipalities and the state use due care, there is no possibility of loss on their part in case of insolvency of the bank. Why, then, should they be given a further preference by being placed in the guaranty fund.

The next class is, the obligations of a bank as indorser upon bills rediscounted and bills payable. It takes but a statement of the proposition to show this to be a

reasonable classification, for the very sufficient reason that neither of these in any way relate to the question of deposits. The law was framed for the protection of depositors. The bank's liability as an indorser upon a rediscounted note, or an obligation for which it had given its note, is in no sense a deposit, and would be foreign to the purposes of the act.

The last classification is, "money borrowed temporarily from its correspondents or otherwise." For the reasons heretofore given, the person or corporation loaning this money has the right to exact security from the assets of the bank, and should not be accorded the right of further security.

Ninth. In section 7 of the act it is provided:

"No bank which pays interest at a rate greater than three per cent per annum upon any form of deposit . . . shall be permitted to participate in the benefits of the act."

Here again the classification was in the interest of safety to the fund and sound banking, and the limitation of interest was an attempt to solve a difficulty, which went to the very heart of the whole plan. It was argued against the law that dishonest persons would engage in banking, and having secured the public confidence by joining the "safety fund," would seek to attract large deposits by paying unfair rates of interest. The result would be the destruction of the prestige of the honest and conservative banker while such methods were employed, and finally the failure of the banker who has been guilty of such unbusinesslike methods. The fund would thus be weakened, the banks of the whole community injured, and the whole purpose of the law defeated. It was also manifest, for the same reasons mentioned above, that bankers who paid the higher rates of interest for deposits were poorer risks than those who paid less rates of interest, and that the rates for admission to the fund should not be the same to both classes of bankers. The solution, therefore, was

to offer bankers the choice between paying only fair rates of interest or staying out of the fund.

For the same reasons it is also provided in section 7 that no bank which pays any interest on savings deposits withdrawn before July or January first next following the date of the deposit shall be permitted to participate in the benefits of the act.

The dates January and July first are in themselves arbitrarily selected. March and September, June and December, or any other six-months period would have answered as well.

It has always been the custom of banks carrying savings accounts to fix semiannual periods for carrying forward the interest accumulations on the savings deposits. This was done as a matter of economy, as the accounts are small and numerous. By having the interest period the same in all accounts the work may be done with less clerical force than if a few hundred accounts came due each day. The fixing on these dates is enacting into law a custom universally used by savings departments of banks. Prohibiting interest payments at other periods carries out the original plan of not admitting deposits upon which interest is paid on daily balances, because if interest is paid on withdrawals made before the semiannual interest-paying periods, it amounts to payment of interest on daily balances.

It is also provided in section 7 that no bank which pays interest upon a time certificate cashed before its maturity shall be permitted to participate. The payment of such interest is the same as paying interest on daily balances.

While on the subject of interest-bearing deposits, around which are built most of the certifications of deposits, it seems to be the policy of the state to reduce this class of deposits to the minimum. The reasons are twofold, as shown by banking experience. The desire of the officers of the bank to increase its earnings, in the interest of the stockholders, either induce them to charge a higher rate of interest to offset the interest

paid the depositors, or they encroach on the reserve fund in making loans and reduce that fund below a safe point; in the first case, increasing the rate of interest to the borrower, and in the second endangering the solvency of the bank, both being the result of payment of interest to depositors. The higher the interest paid to depositors the higher the rate to the borrower, or the greater the encroachment on the reserve. The state in its wisdom saw fit to make a uniform rate of interest not exceeding three per cent and exclude deposits on which interest is paid on daily balances. The state is the judge of the wisdom of this regulation.

Tenth. Trust companies are also excluded from the benefit of this act. While trust companies are permitted under the laws of Kansas to receive deposits, they are not properly banks. They have privileges and rights which are not in line with the banking business. A reference to chapter 425, Laws of 1907, will disclose the many functions of trust companies entirely foreign to banking. We note a few: They may receive on deposit for safe-keeping personal property of every description; they may accept and execute all trusts committed to them; they may act as assignees, transfer agents, receivers, trustees, executors, administrators and guardians; they may act as attorneys; they may act for any person or corporation; they may become surety on official or other bonds; they may insure and guarantee titles to real estate; and may do many other acts, which need only to be mentioned, to show that they are in no way in common with a banking business, and should not be classified as such, and could not therefore be guaranteed on like terms with common banks, which take the usual commercial deposits and nothing else, and are therefore subject to no other liabilities.

Eleventh. By way of a few general observations in relation to all of these classifications, we desire to say it will be assumed by this court that all persons who

have the right of voluntary action conduct their business in a manner which seems best to them and to their best interests. The person who desires to deposit his money, or a portion thereof, in a bank which will pay him four per cent interest has an undoubted right to do so; the person who desires to deposit his money in a bank which will pay him some rate of interest upon daily deposits has the undoubted right to do so; the person who desires to carry a savings account of more than one hundred dollars upon which the bank has not reserved in writing the right to require sixty days' notice of withdrawal has the undoubted right to do so, and has the undoubted right to make such contract with the bank as it will make, and he sees fit, as to the rate of interest. If a number of persons desire to continue in the private banking business, they have the undoubted right to do so; if a number of persons desire to incorporate a trust company and do the business which such a company may transact, they have the undoubted right to do so; but each and all of them, in exercising their own judgment for their own best interests, place themselves voluntarily in these different classes. They cannot complain of the state if in the exercise of its control over its banks it recognizes the classes in which they have voluntarily placed themselves. The state has the same right to classify that the citizen has, so long as it treats all in the same class in the same way.

The court will also remember that the banking business is a moving business; that so long as the obligation into which a person has entered is carried out to the letter he is not in a position to complain. The private banker of to-day may be the incorporated banker of to-morrow; the savings depositor of to-day may be the general depositor of to-morrow; the person with a certificate bearing four per cent interest to-day may have his money in a general fund, or in a three-per-cent certificate to-morrow; changes are being made from day to day. It takes time for a new law to be gotten

into operation in all its features, and until a new law is operating in all its features, no persons or courts can say what are going to be the beneficial or deleterious results of that law. It seems to us that very largely the complaints set forth in the bills, and as presented to the court in the oral argument, are speculative and based upon fears as to what may occur in the future, and not based upon the actual fact as it now exists.

Twelfth. We do not presume it would be claimed upon the part of those officers representing the state of Kansas here, or their counsel, that this law of the state of Kansas is the very best law that might have been passed upon that subject. It is to some extent a new venture. There may be matters of procedure and detail pointed out by able counsel for the complainants which, if brought to the attention of the law-making body, would have induced them to change some of the provisions of the law. This does not, however, argue against the validity of the law.

BANKS IN KANSAS.

THE POWER TO REGULATE THE BANKING BUSINESS AS IT HAS BEEN EXERCISED IN KANSAS.

The right to regulate banking as a public business, and as one to which the police power of the state extends, has always been recognized in this state. Article 13 of the constitution covers the topic "Banks and Currency." This was in line with the definition once given by Mr. Webster and recognized that no institution was a bank which did not have the power to issue promissory notes with a view to their circulation as money.

Afterward, and in *Pape v. Capitol Bank*, 20 Kan. 440, it was held that this article of the constitution applied only to banks of issue, and in this state we recognized an institution which performed the functions of a bank, other than that of issuing notes, as being a bank.

Again, in 1891, provision was made for the organiza-

tion of banking corporations, and the power to regulate them was assumed by the state. These rights to regulate and control were upon the following subjects:

FIRST.—*The Shareholders' Liability.* And the shareholder in every bank organized under the act was made additionally liable for a sum equal to the par value of the stock owned, and no more.

SECOND.—*The Investment of Funds.* It was provided that no bank should employ its money directly or indirectly in trade or commerce, buying or selling goods, in the stock of any other bank or corporation, nor loan on its own capital stock, nor purchase or hold any of its own shares, in this way regulating and controlling and directing the business of banking.

THIRD.—*As to Reserve Funds on Hand.* The law required banks located in cities or towns of less than 5000 to have on hand at all times in available notes an amount equal to twenty per cent of their entire deposits; for banks located in cities of more than 5000, twenty-five per cent of their entire deposits, one-half of which might consist of balances due them from good solvent banks located in commercial centers and one-half consist of actual cash; provided, that any bank which is made a depository for another bank shall have on hand at all times twenty-five per cent of its entire deposits. It further provided that when all the available funds in a bank should fall below the required amount, said bank should not increase its investments by making any new loans or discounts, nor make any dividends of its profits, until the required proportion of its lawful money reserve should be restored.

FOURTH.—*Bank Commissioner.* It created the office of bank commissioner and gave him the power and made it his duty to notify any bank whose lawful money reserve should be below the amount required to make good the reserve, and failing to do so for thirty days after notice made it his duty to take possession of the bank and proceed as if the bank were

insolvent. It gave the commissioner power to refuse to consider as a part of its reserve balances due to any bank or from another bank or association which should neglect to furnish him with such information as he should require from time to time relating to its business. It required every bank to make a report at least four times each year to said commissioner, and oftener if called upon by him for one. It required each such report to exhibit in detail all of the business of the bank, its reserves and liabilities, and required a public statement to be made of the business of the bank.

FIFTH.—*Loans Limited.* It provided that the total liability of any bank or of any one person, company, corporation or firm for money borrowed should not exceed at any time fifteen per cent of the capital stock and surplus of such bank actually paid in; and gave the bank commissioner authority to order any excess loan reduced to the lawful limit within sixty days from the date of his notice.

SIXTH. It made the officers of insolvent banks receiving deposits with knowledge guilty of a felony.

These and many other regulations were imposed by the legislature of our state upon the banking business, and yet there are those arguing in this case who affirm that the banking business is as free from control of the police power of the state as the grocery business or the blacksmithing trade.

In the case of *Blaker v. Hood*, 53 Kan. 499, the Kansas banking act was attacked as unconstitutional. It was argued in that case that the right to run a bank was not a franchise, nor does it fall within the police power of the state. The same authorities were cited as appear in the briefs for complainant in this case. The points raised were that the constitution of the state of Kansas gives no power to the legislature to control banks; that the right to carry on banking business at common law belonged to the individual and was beyond legislative control. A special attack was made upon the

act to create the office of bank commissioner and the giving of him power to require reports, make investigation and prescribe business methods intended to protect the depositors and patrons of the bank; also, the power given to appoint a receiver to wind up the affairs of a bank. The supreme court held, on page 508:

"The question with us is whether the banking business is of such a character as to warrant the legislature, in the exercise of the state's police power, to impose reasonable regulations upon the means and methods by which it is conducted. There are many occupations and lines of private business which the legislature, in the exercise of the internal police power, may rightfully regulate."

And quotes from Tiedeman on Limitations of Police Power, page 194. The court then concludes that all of the provisions of the law are within a proper exercise of this power and that the law was a proper exercise of the legislative power.

A bank is a public or *quasi*-public corporation, in the nature of the business transacted by it. By the act of incorporation, the state allows it to invite the confidence of the public and invite the public generally to bring their money to it for safe-keeping. Under the laws as they now exist, the banks of states become the depositories of public funds belonging to the states, counties, cities, townships and school districts, and it would seem to be competent for the state to make any reasonable regulation and requirement which will tend to increase the confidence of the public in its banks and will tend to the safe-keeping of its funds, both public and private, committed to the bank; and the fact that the state has adopted other regulations for the safety of the public funds in no wise argues against the right to provide regulations for the safety of private funds.

The state grants to banks organized under its laws the right to loan a certain per cent of the deposits, or use them in other lines of business, not inconsistent with a banking business. It is not contemplated that

all of the money of all of the depositors shall be in the vaults of the bank at all times. Such a regulation would entirely destroy the object of the private individual entering into the banking business; but it is contemplated that the money so deposited shall be kept safe and shall be all returned to all of the depositors at such times and in such amounts as they shall demand.

The history of banking and the usages of business have reduced almost to an exact science the proportion of the daily deposits which will be drawn out and put into the channels of business, and as the banks of the state are given the privilege to use these funds, both public and private, it would seem no departure from the original banking business, or the idea incorporated therein, that they should be required by proper regulation to secure the payment of such money and to secure the safety of the funds, so that the business of the state may be upbuilt by reason of the confidence of the public in these institutions.

The right of the state to make regulations for the security of the banking business must be assigned to the police power of the state. It has always been recognized that states have the right to control the banking business as a public business under this power. Whatever may be said about the right to conduct the banking business, it has always been recognized that the sovereign power of the state has the right to regulate it. The states and the national government have always exercised this power.

"While the right to do a banking business is not a franchise and belongs to all citizens generally, yet the power to carry on such business through a corporation is a franchise dependent upon powers granted from the state."

Bank of California v. City and Co. of San Francisco.
142 Cal. 246.

64 L. R. A. 918.

100 Am. St. Rep. 100.

75 Pac. 832.

Such rights may be taken from the citizen by the state and given to corporations in the nature of franchises. The right to issue circulating notes by banks was at one time the right of any citizen engaged in the banking business.

In 1839, Mr. Webster, in the course of his argument in *Bank of Augusta v. Earl*, 13 Peters, 519, said (564) :

"What is that, then, without which any institution is not a bank, and with which it is a bank? It is the power to issue promissory notes with a view to their circulation as money."

This franchise of state banks has been taxed out of existence by the national government and the private or state banker effectually deprived of it.

THE FUND DOES NOT BELONG TO THE STATE, AND THEREFORE THE STATE DOES NOT IN ANY WAY ENGAGE IN INSURANCE.

The bill charges that this law is about to plunge the state of Kansas into an insurance business, that such business is private in its nature, and therefore the law would be invalid for that reason. We deny that the insurance business is a private business under the decisions.

In the case of *Equitable Life Assurance Society v. Brown*, supra, at page 41, in speaking of the insurance society, Mr. Justice PECKHAM said:

"The corporation is one of the largest in the world, with its more than half million policyholders, its outstanding risks of an amount almost impossible to appreciate, and with assets and liabilities and surplus reaching into hundreds of millions of dollars in amount. The defendant is in its nature a public institution, and the interests of its policyholders are directly involved in any proceeding looking toward its winding up, and indirectly the interests of many hundreds of thousands of individuals connected with the policyholders as objects of their bounty."

This quotation suffices to indicate the view that is being taken by the courts of the insurance business and the great financial business institutions of the country.

The same words used by Mr. Justice PECKHAM as to the insurance society might well be used as to a particular bank or the banking business. However, there is nothing said in the law under consideration that would embark the state in the insurance business. The act in question allows the defendant banks coming within its provisions to contribute to a fund. It places that fund in the custody of the state treasurer simply as a matter of convenience. The custody of that fund might as well have been placed in any other officer. In section 3 of the act under consideration is the following:

"The treasurer of the state of Kansas shall hold this fund in the state depository banks, as provided by law governing other state funds, subject to the order of the bank commissioner, to be countersigned by the auditor of state, *for the payment of depositors of failed guaranteed banks as hereafter provided.*"

It will thus be seen that the only manner in which the state treasurer handles this fund the same as other funds belonging to the state is in the depositing of the same in the depository banks for the purpose of accumulating interest thereon, but the fund itself is special, kept in the custody of the state treasurer for the sole purpose of paying the depositors of failed guaranteed banks as provided in the act. It can be used for no other purpose. It does not belong to the state of Kansas. The state of Kansas has no power, by legislative enactment, to divert this fund to any other use.

In 1831 the state of Vermont passed a law very similar in its operation to the act under consideration. That law was before the supreme court of Vermont in the case of *Receiver of Danby Bank v. State Treasurer*, 39 Vt. 93, and while its constitutionality and its many distinctions and classifications were not before the court, it being taken for granted, so far as any litigation over the laws was concerned, that the enactment was constitutional and was a proper regulation and control of the banking business, the question was raised

as to the ownership of the money paid into the guaranty fund. In the syllabus the court said:

"The treasurer holds the money constituting the bank fund as a specific fund in which the state has no property, and he is charged with special duties in respect thereto."

And at page 100 in the opinion Mr. Justice BARRETT said:

"But it is claimed, under the law, it shall be held that the whole amount of that fund is in the hands of the treasurer, undiminished by the payments that have been made to the banks named of the proportions they had respectively contributed to said fund. The soundness of this claim depends on the real character in which the treasurer receives and holds the money which goes to constitute the 'bank fund.' If it be a receiving and holding of the money as the property of the state, the same as he receives and holds the money that is paid into the treasury by the collectors of taxes, that is to say, if it be money of the state, subject, indiscriminately with the money derived from taxation, to a special charge by a permanent general law, and an appropriation by virtue of such charge to the satisfaction thereof, then it would follow that the treasurer should pay over to the receiver, of the money in the treasury, indiscriminately to the full extent of money in his hands as treasurer, not exceeding the extent of such charge. But, in the opinion of the court, this is not the correct view to be taken of the subject. We think the treasurer holds the money as a specific fund in which the state has no property. He is charged with special duties in respect to that fund, and becomes officially responsible for the proper discharge of those duties.

"For present purposes it need only be added, that all the provisions of the statute upon the subject preclude the idea of that fund being absorbed by the state as a part of its general assets, with only the duty on the part of the state to permit an equal amount to be taken from the treasury to answer the purposes of the statute as to that fund. The statute provides for an entire separation of the fund; for its investment by the treasurer; for its recall by him or its replacement by the sale of securities which he has received by way of investment."

THE POLICE POWER AND THE NECESSITY FOR ITS EXERCISE.

It is argued by appellants that there must be absolute necessity for legislation before in the exercise of the police power legislation may be had. We submit that this is not correct, that the word "necessity" in this connection does not mean a compelling necessity.

That the police power or the power to make a law must be exercised only when necessary means, when reasonably necessary to accomplish a public need as distinct from the demand of a class. *Lawton v. Steele*, 152 U. S. 133. It must be necessary for the interests of the public generally. 142 Fed. 552. The necessity is that it is necessary for the public or general welfare. See *State v. Redmon*, 134 Wis. 89; 126 A. Sr. 1012. The court, in speaking of the necessity for the law, says:

"Not that a police regulation, in form or pretense, to be one in fact must apply some absolute essential to the public welfare, but that the exigency to be met must so concern such welfare, be sufficiently vital thereto, as to suggest some reasonable necessity for a remedy affordable only by a legislative enactment, as to efficiently invite public attention thereto, it being regarded as a legislative function to primarily pass upon the matter."

The reasonable necessity for this law was to be determined, in the first instance, by the legislature. It could make provision that banks desiring to provide security for their depositors could do so by complying with the provisions of the act. The test of the necessity for it was that it promoted the general welfare of the public, that is, the people who make deposits in banks. This is the broad and general purpose of this law, and if it inspires the confidence of the public in such guaranteed banks as the complainants in their bill admit and allege that it does, then this confidence of the public is for the benefit of all, including the bankers as well as their creditors, the depositors.

POLICE POWER AND LIMITATIONS.

The regulation of the banking business is within the power of the state to regulate and control for the protection of the interests of the public, and the stockholder in any corporation cannot complain of any such proper regulation made by the state in the exercise of this sovereign power.

"The police power of a state embraces regulations designed to promote the public convenience or general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."

C. B. & Q. v. People (Ill.), *ex rel.* Drainage Commission, 200 U. S. 561.

The police power of the state is the power of sovereignty. Thus it was said by Chief Justice TANEY in the License Cases, 5 How. 583:

"It has been said, indeed, that quarantine and health laws are passed by the states, not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard the lives and health of their citizens. This, however, cannot be said of the pilot laws, which are yet admitted to be equally valid. But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power, that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States. And when the validity of a state law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the

citizens of the state from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.

"The right of banking, in all its departments, at common law belonged to the individual citizen, to be exercised at pleasure. It is conceded by counsel, and it is unquestionably settled, that the sovereign authority of the state may regulate and restrain the exercise of such right. *Bank of Augusta v. Earle*, 13 Pet. 519, 596, 10 L. Ed. 274, 311; *Blaker v. Hood*, 53 Kan. 499, 24 L. R. A. 854, 36 Pac. 1115; *State, ex rel. Goodsell, v. Woodmansee*, 1 N. D. 246, 11 L. R. A. 420, 46 N. W. 970; *Curtis v. Leavitt*, 15 N. Y. 9, 52; *Atty. Genl. v. Utica Ins. Co.*, 2 Johns, ch. 371; *People, ex rel. Atty. Genl., v. Utica Ins. Co.*, 15 Johns, 358, 8 Am. Dec. 243; *People v. Bartow*, 6 Cow. 290; *Nance v. Hemphill*, 1 Ala. 551; *State v. Williams*, 8 Tex. 255; *State v. Stebbins*, 1 Stew. (Ala.) 299; 1 Morse, *Banks & Banking*, 4th ed., § 13; *Zane, Banks & Banking*, §§ 9, 10."

State v. Richcreek, 5 L. R. A., n. s., 878, (Ind.) 77 N. E. 1085.

It is not our purpose to go into an analysis of the banking business, but we call attention to some authorities which give reasons for regulation under this power of the state.

Freund on Police Power says (sec. 400) :

"When we examine the nature of the restrictions on the business of banking and insurance, we find that they nearly all aim at the losses resulting from insolvency of the bank or insurance company. This loss is to be averted by insisting upon some guaranty of financial stability. Provisions of this character are not absolutely confined to banking and insurance; in some states railroads or other public service corporations may not issue securities without complying with prescribed conditions, or without the consent of designated authorities; and the power of corporations to borrow may be generally limited. But in the case of banking and insurance they are not necessarily confined to corporations, and by far exceed the financial regulations imposed upon any other kind of business. While all the provisions furnish protection against fraud, they do not pretend to be limited to guarding against that danger, but plainly seek to prevent mere improvidence or inadequacy of resources."

The peculiar nature of the banking business is next considered by this author:

"The justification for this must be found in the peculiar nature of the business regulated; both banks and insurance companies deal in their own credit, while they receive cash; and, in addition, banks and life insurance companies are the depositories of a large proportion of the savings of the people, so that the management of each institution affects a considerable part of the public. These conditions create a special public danger, requiring a more incisive exercise of the police power than is called for in an ordinary business."

A PUBLIC INTEREST.

Section 401: "Banking and insurance, being peculiarly affected with a public interest, it follows that the right to carry on either business may be made to depend upon the compliance with certain conditions; and a license may be required as evidence of compliance. In New York, in the case of savings bank and trust companies, the authorization is only given upon ascertaining that the general fitness of the organizers for the discharge of the duties appertaining to the trust is such as to command the confidence of the community, and that the public convenience and advantage will be promoted by such establishment."

In section 40 the same author says:

"Somewhat related to the requirement of a license is that of a bond or deposit to secure the faithful compliance with police regulations, and the satisfaction of liabilities that may arise from their violation, or to serve as an indemnity fund for persons who have suffered by the fraudulent conduct of business. As a subsidiary measure of police control it appears to be permissible wherever a license may be required, but it is resorted to less frequently. A bond is required not uncommonly of the liquor sellers and of auctioneers; deposits are sometimes required of peddlers, itinerant merchants, of persons advertising bankrupt sales—above all, of persons or corporations engaged in the *quasi*-public business of banking, insurance, or warehousing."

Upon the public nature of the banking business, and the reason for state control, we quote:

"The *quasi*-public nature of the banking business,

and the intimate relation which it bears to the fiscal affairs of the people and the revenues of the state, clearly bring it within the domain of the internal police power, and make it a proper subject for legislative control. Bankers invite general deposits primarily for their own profit, and generally obtain a measure of public patronage, and the expediency of guarding the people against imposition, extortion and fraud, of affording efficient means of detecting irregular practices, and of learning the true financial condition of the bank, and the necessity of preserving the confidence of patrons in its solvency, and of protecting their interest in cases of insolvency, justify inspection and control by the state. When the sovereign people of a state, acting through the legislature, find such police regulation necessary to protect public health, safety, or morals, to prevent fraud or oppression, or to promote the general welfare, the power to act is supreme, subject only to such limitations as are imposed by the fundamental law. The question as to what regulations are proper and needful is primarily for legislative decision; yet, when the police power is used to regulate a business or occupation which in itself is lawful and useful to the community, the courts, if called upon, must determine finally whether such regulations as may have been prescribed are so far just and reasonable as to be in harmony with constitutional guaranties. *Republic Iron & Steel Co. v. State*, 160 Ind. 379, 385, 62 L. R. A. 136, 66 N. E. 1005."

State v. Richcreek, 5 L. R. A., n. s., 878.

We do not desire to overburden the court with quotations from the reports, but knowing as we do the desire of the court to have all the information possible, it is the duty of counsel, as far as possible, to assist the court in arriving at a correct solution of the questions before it. We venture to call the court's attention to a number of miscellaneous cases bearing upon the questions which have been specifically referred to in the previous pages.

In *Platte Canal Co. v. Dowell*, 17 Colo. 376, the report says:

"Private corporations occupy in respect to the police power precisely the same attitude as private individuals engaged in similar branches of business. The fact

that by their articles of incorporation or charters they obtain certain rights and privileges and are empowered to transact certain kinds of business in certain specified places does not exempt them from police regulations in the interest of society; and this is true even where such regulations operate to injure the business authorized and to diminish the value of the property employed therein."

In the case of *State v. Noyes*, 47 Me. 189, the court said:

"Private corporations, without any express reservation of the powers over them in the act of incorporation, by the legislature, are subject like individuals to be restrained, limited, and controlled in the exercise of powers granted, by such laws as the legislature may pass, based upon the principle of safety to the public."

In speaking on the same subject in *Atty.-gen. v. Fitchburg R. Co.*, 142 Mass. 40, it was said:

"Even if new and more onerous duties are imposed on contracting parties, laws for the government of the citizens of the state and for their welfare and safety are not necessarily unconstitutional."

In the case of *Boston R. Co. v. York Co.*, 79 Me. 386, the court said:

"The power of the legislature to impose uncompensated duties, and even burdens, upon individuals and corporations for the general safety is fundamental. It is the "police power." Its proper exercise is the highest duty of government. The state may in some cases forego the right of taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. This duty, and consequent power, override all statute or contract exemptions. The state cannot free any person or corporation from subjection to this power. All personal as well as property rights must be held subject to the police power of the state."

In *Com. v. Farmers' Bank*, 21 Pick. (Mass.) 542, the court said:

"*Regulation of banks.*—Where a statute provided that bank commissioners shall be appointed by the governor, that they shall visit the banks and shall have free access to their vaults, books and papers, and shall

make all such inquiries as may be necessary to ascertain the condition of the banks and their ability to fulfill their engagements, and whether they have complied with the provisions of law, and may summon and examine, under oath, the officers and agents of the banks, in relation to the transactions and condition of the banks, and that an officer or agent who shall refuse, "without justifiable cause," to appear and testify when thereto required, shall be subject to fine or imprisonment; and if upon examination of any bank the commissioners shall be of opinion that it is insolvent, or that its condition is such as to render its further progress hazardous to the public, and that it has exceeded its powers or has failed to comply with all the rules, restrictions and conditions provided by law, they may apply to a justice of the supreme judicial court to issue an injunction to restrain such corporation, in whole or in part, from further proceeding with its business until a hearing of the corporation can be had; and the justice will forthwith issue such process, and, after a full hearing of the corporation upon the matters aforesaid, may dissolve or modify the injunction or make it perpetual, and, at his discretion, appoint a receiver, it was held that the statute was not unconstitutional on the ground that a suspension of the proceedings of a bank by the injunction diminishes the period for which the bank is by its charter empowered to act as a corporation."

In *Newton v. Mahoning County*, 100 U. S. 557, the court said:

"A state statute which is a public law relating to a public subject within the domain of the legislative power of the state, and involving the public rights and public welfare of the entire community affected by it, can confer no contract right within the protection of this constitutional provision. Every succeeding legislature possessed the same jurisdiction and power with respect to such matters as its predecessors."

THE POWER IS NOT THE TAKING OF PRIVATE PROPERTY FOR A PRIVATE USE, BUT IS THE POWER TO PERMIT OR REQUIRE COÖPERATION.

As examples of authority under the police power for a state to compel coöperation in joint improvements, see *Freund on Police Power*, secs. 440, 441; the drainage and irrigation laws of the several states; the formation

of drainage or irrigation districts under such laws, which may include the lands of non-consenting owners.

Therein, in section 444, compulsory coöperation for the building of division fences or the prorating of expenses to adjoining owners has been firmly established in legislation and the validity of it so often assumed as to be beyond question. Hence, the compulsory coöperation in regard to party walls is well recognized. A compulsory coöperation in draining and irrigation is sustained by the decisions of the courts of the states and of this country. That author states (sec. 436) that compulsory insurance in connection with registration of titles, adopted by several of the states, which includes in it general compulsory mutual insurance, is not out of harmony with the American constitution, and that such legislation is getting more general in the United States, and has been general in Germany for a long time.

On drainage see *Wurtz v. Hoagland*, 114 U. S. 615, 29 L. Ed. 229.

FUND FOR DAMAGES TO SHEEP.

In Connecticut, Wisconsin, Ohio and Michigan, legislation has been upheld the principle of which is on all fours with the compulsory insurance of deposits and the taxation of the expenses thereof to the banks. It is the legislation which levies a tax for the keeping of each dog upon its owner, and therefrom constituting a fund for the payment of damages resulting from such dogs.

Tenny v. Lentz, 16 Wis. 566.

Van Horn v. People, 46 Mich. 183.

Holst v. Row, 39 Ohio St. 340.

Town of Wilton v. Weston, 48 Conn. 325.

The first of these is *Tenny v. Lentz*, 16 Wis. 566. The laws of Wisconsin of 1860 provided for a license tax on dogs and gave an owner of sheep killed by dogs a right to be paid the damages thereof by the town in which the master of the dog lived, and the town was

reimbursed from the dog-tax fund. The court held that this was a proper exercise of police power. Here was a tax on certain property, to wit, dogs, or a license to protect the public from something connected with the activity of the dogs, that is, the loss of sheep, falling within the rule laid down by this court in the Gibbes case.

The next case, under the laws of Michigan of 1877, which appears in the case of *Van Horn v. People*, 46 Mich. 183. A charge was laid on the owners of dogs in the character of a tax to raise a fund out of which damages done by dogs to sheep were to be paid. It was held that this is not strictly a tax law, but an exercise of the proper police power of the state.

The next case is that of *Holst v. Row*, 39 Ohio St. 340. In that, likewise, section 2754 of the Revised Statutes of Ohio provided a license tax on dogs, and section 4215 provided that the special fund created by this tax should be devoted to the payment of losses sustained by owners of sheep killed by dogs, and the court held that this was a proper exercise of police power.

Again, *The Town of Wilton v. The Town of Weston*, 48 Conn. 325, was a case where the laws of Connecticut, providing that the damage done by dogs to sheep, lambs or cattle, proved to the satisfaction of the selectmen to have been committed in either town, shall be paid by such town and that the town might recover damage from the owner or keeper of the dog if a resident of such town; or, if of another town, of the town in which the owner or keeper lived. The funds thus to be paid out are to be realized not only by the right to sue the owner, but a special tax or license fee which the keepers of dogs are compelled to pay upon penalty of being criminally prosecuted raised the necessary revenue. This is set out at page 337 of the opinion. In this case exactly the same argument was made by the defendant as here by the complainant. In the brief for the plaintiff in error in that case it was said:

"The statute is invalid so far as it makes a town,

and, consequently, every inhabitant, responsible for damage done by dogs whose owners reside within the town. This is opposed to natural right and justice. It can be sustained only upon the theory that the legislature has the right to say that the property of a town, and of A, an inhabitant thereof, shall be taken to pay B; the power to impose by statute upon a corporation a claim which it was never concerned in creating, against which it protests, and which is unconnected with the ordinary functions of municipal government. But the courts have repeatedly declared that if the courts should order a city or town to apply its funds or raise money by taxation to establish one of its citizens in business, or for any other object, no matter how worthy, equally removed from the proper sphere of government, the usurpation of authority would not only be plain and palpable, but the duty of the court to declare the order void would be imperative."

And to this objection, being the very objection of plaintiff in this action, the court in that case said:

"But is the act valid in its method of accomplishing its object in view?

"And this brings us to the precise point of objection. Why require the town to assume the burden of paying the damages in the first instance, and the bringing suit to recover the amount either of the owner of the dog or the town where he happens to reside?

"The general answer is, that as a system of police regulation it cannot well be made effectual for the accomplishment of the objects except through some such agency on the part of the towns."

LAWS REQUIRING VESSELS TO CONTRIBUTE TO A FUND FOR DECAYED PILOTS HELD GOOD.

The case of *Cooley v. Property Wardens*, found in 12 Howard, 298, is one where the supreme court considered a law levying pilotage fees upon vessels, a portion of which was used for the relief of decayed pilots. On page 313 Mr. Justice CURTIS said:*

"Nor do we consider that the appropriation of the sums received under this section of the act to the use of the society for the relief of distressed and decayed pilots, their widows and children, has any legitimate tendency to impress upon it the character of a revenue

law. Whether these sums shall go directly to the use of the individual pilots, by whom the service is tendered, or shall form a common fund, to be administered by trustees for the benefit of such pilots and their families as may stand in peculiar need of it, is a matter resting in legislative discretion, in the proper exercise of which pilots alone are interested."

Here was a case where the vessels paid part of the fees to the pilots themselves, and part of the fees that would go to the pilots went into a common fund for the benefit of all pilots. It may be said that the private property of these pilots was taken to be used for their benefit through compulsion for the private use of others.

CASES WHERE INSURANCE COMPANIES ARE COMPELLED TO SUPPORT FIREMEN.

There is another class of statutes passed by different states compelling the payment of fees by fire insurance companies, a certain part or percentage of which goes to a fund for the relief of firemen. We cite the following cases where the validity of such laws was considered and passed upon by the courts:

Phoenix Ins. Co. v. Fire Department of Montgomery, Ala., 42 L. R. A. 468.

Trustees of Exempt Firemen's Benevolent Fund v. Roome, 93 N. Y. 313.

Firemen's Ben. Assoc. v. Louisburg, 21 Ill. 511.

Fire Department of Milwaukee v. Helfenstein, 16 Wis. 142.

In the Alabama case the court considered the question of such a tax being a deprivation of private property for private purposes. On page 472 the court said:

"To justify the court in arresting the proceedings and declaring such a tax void, the absence of all possible public interest in the purposes for which the funds are raised must be clear and palpable—so clear and palpable as to be perceptible by every mind at the first blush."

This case discusses the principle involved as dis-

tinguished from the principle considered in cases like *Loan Association v. Topeka*, 20 Wallace, 663, and shows that the doctrine announced in the 20 Wallace case is the taking of property for a purely private purpose, where no *possible public interest is involved*.

In the Illinois case it was held that the enactment of such a law was under the police power upon a subject that the public had a general interest in and the individuals or classes upon whom the burdens are imposed had a particular interest in the performance of the acts.

REQUIRING RAILROADS TO PAY FEES FOR EXAMINATION
OF EMPLOYEES' COLOR BLINDNESS.

"It is competent for a state to require the examination and verification by its officers of railroad operatives as to fitness, in those respects which involve public safety; and it may require the railroad company to pay the expenses of all acts and proceedings necessary to that end.

"*Morgan's La. & Tex. R. & S. Co. v. La.*, 118 U. S. 455 (30: 327); *Blair v. Milwaukee & P. R. Co.*, 20 Wis. 262; *New Albany & S. R. Co. v. Tilton*, 12 Ind. 3; *Jones v. Galena & C. R. Co.*, 16 Iowa, 6; *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140; *Waldron v. Rensselaer & S. R. Co.*, 8 Barb. 390; *Kansas Pacific R. Co. v. Mower*, 16 Kan. 573; *Gorman v. Pacific R. Co.*, 26 Mo. 441; *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140; *People v. Squire*, 10 Cent. Rep. 437, 107 N. Y. 593."

Nashville, Ch. & St. Louis R. Co. v. Alabama, 128 U. S. 96, 32 L. Ed. 352.

A statute of Alabama declaring all persons afflicted with color blindness disqualified from serving on railroad lines, imposing a fine upon railroad companies employing them, and requiring employees to be examined and the railroad companies to pay the fees allowed for examination, held good.

Nashville, Ch. & St. Louis R. Co. v. Alabama, 128 U. S. 96, 32 L. Ed. 352.

The court held:

"Requiring railroad companies to pay the fees allowed for the examination of parties who are to serve on their railroads in one of the capacities mentioned is

not depriving them of property without due process of law."

The principle upon which such legislation is sustained is that the public has an interest in the subject of the laws, and that the regulation of the subject is a proper exercise of the police power of the state; and where the subject of legislation is of such public interest as to authorize the state to exercise this power, then the interest of the individual must give way to the interest of the public.

If this, as a proper regulation of the banking business, warrants the state in the exercise of the police power to make such regulation, then all objections made by the individual that it is the taking of property without due process of law, that it denies the equal protection of the laws, or that it is a violation of the obligations of contracts, cannot be urged as against the power of the state to make such regulations as are for the public good.

THE DEPOSITOR'S CONTRACT WITH THE BANK.

In the previous oral argument, the question was raised as to the right of a depositor to insist that after a deposit is made the bank shall not in any way be by the state compelled to take any of its property to which the depositor had the right to look for the repayment of his deposit and divert it to some other use. We believe it is admitted that if this diversion is along the lines of bank control and the exercise of the police power, the depositor may not complain; but, on the other hand, it is contended that if it is not along the lines of bank control and the exercise of police power the individual depositor may complain of a misuse of some portion of the property of the bank. In the first instance, we do not believe these complainants are in a position to invoke the aid of this court upon that proposition. They say in their bill that they are and will be creditors and depositors in the different classes of banks. If they

are creditors and depositors in the different classes of banks, they become so of their own volition and in carrying out business plans which to them shall seem entirely proper and to their advantage. If they become creditors or depositors after a bank has received its certificate from the bank commissioner, after it is operating under the bank guaranty law, they become such with full knowledge that the bank will be required to pay a certain amount of money into the bank commissioner's office upon certain contingencies. They, therefore, would not be in a position to complain, as the bank's contract with the bank commissioner under the new law would be a part of their contract also.

On the other hand, if they are depositors or creditors (and so far as these complaining banks are concerned, under the averments in their bills, it means the same thing) at the present time, and leave themselves in that position without demanding the money due from those banks which qualify under this law, they become depositors in or creditors of such bank with full knowledge of the obligations of the bank under the law, and may not thereafter complain. The court will not presume that because a man or a bank is a depositor in another bank to-day he will remain so for any indefinite period in the future. *If these complaining banks, having deposits in a bank which qualifies under the guaranty law, do not desire to remain in that relation to the bank, it would be their duty to demand repayment of their money.* If it is repaid upon demand they have no cause of complaint, and the fact that the bank has taken a part of its funds and placed in another fund would not in any way damage them, if their contract is carried out in full with the bank. They could only raise this question upon insolvency, or upon a refusal of one of the qualified banks to carry out its previous contract with them, and as no such averment appears in the bills this court cannot take cognizance of these complaints by reason of these averments.

We also desire to call the court's attention to the fact

that the depositor in a bank has no specific lien upon any of the funds or property of the bank. The bank's contract with him does not go to the extent that the bank will keep on hand the exact money or retain the exact property it had at the time of the deposit, while the deposit remains in the bank. The bank may sell or otherwise dispose of its property. (*Lawrence v. Greenup*, 97 Fed. 906.) Any other rule would entirely destroy the commercialism of a bank, and destroy the objects for which it was organized. The only contract the depositor has with the bank is "payment on demand," and other creditors "payment when due."

This case must be tried upon the averments in the bills. The bill avers that the banks will be compelled, at stated intervals, to pay one-fifth of one per cent of their guaranteed deposits into the bank commissioner's office, for the purpose of adding it to the guaranty fund, and by reason of such payment and admission into the guaranty fund the bank's business and prosperity will be largely increased. The bill is full of averments to that effect, that a large increase in business, large increase in their assets and earnings, will necessarily come to the guaranteed banks, to the detriment of the unguaranteed banks. In fact, it is by reason of these averments the complainants are seeking relief here. If that be true (and we admit it is greatly to the advantage of the guaranteed banks) how may a depositor, whose only right is based upon the ability of the bank to carry out its contract of repayment with him, complain if the bank, by diverting a very small part of its property, brings to itself large amounts of property, and thus increases its ability to carry out its contract with him?

THE RECIPROCAL BENEFIT COMING TO THE BANKS OPERATING UNDER THE GUARANTY LAW.

A corporate body may be permitted by a state to do things which the state could not compel it to do. The state banks are permitted to loan money upon real estate security direct. The state could not compel

them to accept real estate security. Under the averments in the bill it clearly appears that by the payment of this money, this small assessment, the state banks derive great benefit. If they derive a practical value by way of insurance, or by way of increase of business, it cannot be said to be illegal or void. All corporate bodies have the right to advertise their business, and it is common history that they spend millions of dollars in advertisement of their business in newspapers, magazines and otherwise. In this they take a part of the assets to pay for this advertisement. The question as to whether they are wise and return a sufficient equivalent would in no way bear upon the legality or illegality of the expenditure. Banks are allowed to—in fact good business dictates that they should—insure their property. The premium is paid to an insurance company, and their property is insured by the policy. The insurance company, however, could not insure their property if they did not receive premiums from others; therefore, with the money which A. Bank pays for a policy of insurance the insurance company pays the loss sustained by B. Bank, and so on, without number, instances which might be brought to the attention of the court.

We do not claim the placing of this fund in a certain place to be used in case of the insolvency of a bank is exactly the same as taking an insurance policy, but we do say it is along the same lines, and that each bank which contributes to the fund does receive its indemnity.

The oft-repeated statement that the payments required of the banks operating under the guaranty law are mere gratuities for which the bank receives no benefit is not admitted as a statement of fact by the demurrer to the bills, and is not true in point of fact. Each bank entering into the fund receives a benefit far in advance of the amount of money contributed. In many different ways the bill avers that these participating banks would receive compensation by way of

additional deposits and increased business and profits. It is upon these facts they base their fears that it would result in the annihilation of national banks and such state banks as do not see fit to avail themselves of the privileges and benefits of the act. This benefit may be termed "insurance," "guaranty," "indemnity," "co-operation," or what not. The name is immaterial. The fact remains that the bank receives what it deems value received for the money expended.

Speaking upon this subject, WILLIAMS, C. J., for the court in *Noble State Bank v. Haskell*, 97 Pac. 607, said:

"Because the sovereignty, in the exercise of its police powers, grants or permits franchises to banking corporations, at the same time providing for the protection of all deposits placed therein by creating a depositors' guaranty fund, banking corporations being compelled to pay in a certain stipulated and prorated amount for the benefit of the depositors and for the public welfare, it does not follow that such payments are made by such banks without reciprocal compensation or benefit.

When contracts are made certain confidence is assured in business transactions. When deposits are made safe confidence in banks is assured. Then whatever protects the depositor protects the bank, because it assures confidence in the bank. And with the bank restricted in its operations by a rigid requirement of the law: careful inspection; frequent reports; ample reserve fund to be retained; limitation on the amount that may be loaned; no loan to be made to an active officer therein without criminal punishment being incurred; restrictions as to what the funds of the bank may be invested in—all of these limitations and safeguards thrown around the banking world should justify banks in having confidence in one another. Each bank having a reciprocal interest in the depositors' guaranty fund, thereby each has an incidental reciprocal interest in every other bank.

"The national, state, county, municipal and district governments, as a rule, require security for deposits. Why may not the same power be exercised to require the guaranty of the deposits of individuals? The national, state, county, municipal and district governments prescribe how their deposits shall be secured.

Why should not the government, in the exercise of the same power, prescribe how the banks should guarantee or secure the deposits of the citizens of the state? With the law enforced, the reckless, dishonest and incompetent banker cannot remain in business. The law closes the door of hope against him. For the *pro rata* amount each bank is required to deposit with the banking board to constitute the guaranty fund, every one gets a reciprocal benefit therefrom. For every dollar that a bank is compelled to pay into such a fund it receives a reciprocal protection and benefit, not only for itself, but also for its depositors; for what secures the depositor is certainly a benefit to the bank. It may not be so apparent in times of universal prosperity and contentment; but in the eras of depression and discontent the bank that has the assured confidence of its depositors should certainly be regarded as benefited, for there is no danger of any general and unnecessary withdrawal of deposits from the bank. The bank that can rest assured against such contingencies thereby receives a benefit. Consequently the guaranteeing of deposits occasions not only assurance to the depositor, but relief to the bank from any apprehension of an unnecessary run upon and withdrawals from the bank. Whilst such assessment for the guaranty fund goes to the protection of every other bank, as well as its own, yet every other bank receives a reciprocal benefit for its *pro rata* assessment paid into such fund, and thereby there is an equal reciprocal benefit to every bank in the state."

The history of the country always enters into the decision of every controversy of a public nature. It is common history that upon the failure of a bank, either large or small, in a city or village, business at once becomes stagnant. The merchant is unable to pay his daily bills because his money is tied up in the defunct bank. Very frequently the merchant is obliged to close his doors. The people who are depositors in other banks in the same community, or village, or city, become restive, dissatisfied and panicky. The result very frequently is that by reason of some unwarranted remark made upon the street a run is organized upon another bank, and it either withstands the run, to its

great detriment, or is forced in turn to close its doors. By reason thereof, other merchants fail to meet their obligations, and disasters follow thick and fast. Every person who has read the history of this country knows that the far-reaching consequences of a bank failure can hardly be estimated. Banks in one city are so connected with banks in another that they also are pulled down; and there is nothing which so disturbs business, the state or the community as a bank failure.

It is the public generally that is largely interested in the banks of the country as depositors. It is well known that no individual bank could withstand the loss of public confidence. The business of the bank is largely run upon credit and confidence. The laws, both state and national, recognize this fact by allowing their banks to loan a large percentage of their deposits, and in the requirement that only a small percentage of the deposits shall be retained in the bank. Therefore, no bank could withstand the demands of fifty per cent of its depositors, if they each demanded a repayment of their funds in full. Any law strengthening the confidence of the depositing public in a bank gives to that bank an enlarged capacity for doing business and an enlarged opportunity to earn dividends for its stockholders. In view of the history of banking, it is impossible to say that the contributing banks do not receive a direct compensation from the bank guaranty fund.

While the participating banks receive a direct benefit in returns for the money expended, there is a larger and more widespread benefit coming to the whole people, without regard to class, both depositors and non-depositors, bankers, farmers, merchants, and every other class, in the stability of prices and business. Business disturbances always cause fluctuations in prices, great or small, depending on the extent of the disturbance. A bank failure may affect the price of wheat, corn, cotton, hogs, cattle or other commodity. In this we are borne out by the history of the artificial panic of 1907,

when millions were lost on Wall Street, and by the producers, farmers, merchants and others, by reason of a panic caused entirely by lack of confidence. If this law strengthens confidence in banks, the compensation to the banks is unquestioned.

CONCLUSION.

REPEALING CLAUSE.

The plaintiff finds fault with the sixteenth section of the bank guaranty act, which reads as follows:

"All acts and parts of acts in conflict with this act are hereby repealed in so far as they so conflict, but no provision of any banking law or other statute of this state shall be construed to be amended, modified or repealed, except in so far as necessary to permit the unrestricted operation of this act as applied to banks participating in the privileges of this act."

The complainant says that nowhere in this act is there any provision for amendment or repeal of any section or part of the existing banking law of the state of Kansas. A very full discussion of this subject is found in *Southern Pacific Company v. Bertine*, 170 Fed. 735, pamphlet No. 6, dated September 2, 1909. The case was very similar to the one at bar in that it was not, and did not purport to be, amendatory of any other law. The learned judge in the decision, on page 739, quoted from *Sutherland on Statutory Construction*, at page 448, and says:

"A statute which in general terms repeals all acts and parts of acts inconsistent with its provisions is not amendatory."

CONCLUDING REMARKS.

1. None of these complaining banks are entitled to the relief prayed for in the bill by reason of the fact that only incorporated banks are permitted to participate in the guaranty fund, because they are all incorporated banks and belong to the favored class;

2. Nor, by reason of the fact that private banks are excluded, because none of these complainants are private banks;

3. Nor, by reason of the fact that trust companies are excluded, because none of the complainants are trust companies;

4. Nor, by reason of the fact that banks with a surplus less than ten per cent of their capital are excluded, because the building up of a surplus fund is a regulation in the interests of safe banking, the amount required is reasonable and is a regulation clearly within the power of the state, the surplus being added to the value of the stock, and thus takes no property from the bank or the stockholders; and because, further, none of the complaining banks within this class have applied for and been refused admission to the benefits of the law;

5. Nor, by reason of the fact that banks which pay more than three per cent interest on time deposits are excluded, because there are no averments in the bills showing that any particular complaining bank belongs to that class;

6. Nor, by reason of the fact that banks which pay interest on savings deposits withdrawn before July or January first next following the date of deposit are excluded, because there are no averments in the bills that any of the complaining banks belong to that class;

7. Nor, by reason of the fact that banks organized after the passage of the act and not having been in business continuously for one year are excluded, because none of the complaining banks are thus situated, and, if they were, they could not complain after having taken their charter with this law upon the statute-books;

8. Nor, by reason of the fact that banks which pay interest on time certificates cashed before maturity are excluded, because none of the complaining banks belong to that class;

9. Nor, by reason of the fact that deposits upon which interest is paid on daily balances are excluded, because there are no averments in the bills showing

any of the complaining banks to belong to that class of depositors; and, for the further reason, that in making deposits in a bank they voluntarily select their own class;

10. Nor, by reason of the fact that deposits which are primarily rediscounts or money borrowed by the bank are excluded, because there are no averments in the bill showing that any of the complaining banks belong to this class of depositors, and because of the reasons heretofore specifically set forth in this brief;

11. Nor, by reason of the averments in the bill that all the assets of an insolvent bank, including the double liability of its stockholders, under the law, are applied first to the *guaranteed* depositors, because such averments are not true under the provisions of the act.

12. Nor can any of these complainants invoke the aid of this court in this case, because there are no sufficient averments in any of the bills to confer jurisdiction upon this court or to entitle them to the relief prayed for in the bill.

All of which is respectfully submitted.

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